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No. _____

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SUPREME COURT OF THE UNITED STATES

October Term, 1982

RENEE DuBOIS

DAVID JOHNSON
and
ZACHARY KINNEY
Petitioners

v.

CITY OF COLLEGE PARK
and
MIRIAM WOLF
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals of Maryland erred in approving a reapportionment plan which permits only registered voters to be counted in the apportionment base for determining the apportionment of Councilmanic Districts in the City of College Park?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	iii
JURISDICTIONAL STATEMENT	iv
CONSTITUTIONAL PROVISIONS INVOLVED	iv
STATEMENT OF THE CASE	1
ARGUMENT	8
CERTIFICATE OF SERVICE	23
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
Burns v. Richardson, 384 U.S. 73 (1966)	12, 13, 14, 15
Carrington v. Rush, 380 U.S. 89 (1965)	19
Kirkpatrick v. Preisler, 394 U.S. 526 (1969)	19, 20
Martin v. Venables, 401 F. Supp. 611 (D. Conn., 1975)	12
Reynolds v. Sims, 377 U.S. 533 (1964)	8, 12, 21, 22
Skinner v. Oklahoma, 316 U.S. 535 (1942)	21
Wesberry v. Sanders, 376 U.S. 1 (1964)	9, 11

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

DuBois v. City of College Park, 280 Md 525, 375 A2d 1098 (1977)

DuBois v. City of College Park, 286 Md 677, 410 A2d 577 (1980)

DuBois v. City of College Park, Md , 447 A2d 838 (1982)

JURISDICTIONAL STATEMENT

The Petitioners herein seek review of the judgement of the Court of Appeals of Maryland dated and filed on July 19, 1982.

The jurisdiction of this Court to review the judgement by writ of certiorari is invoked pursuant to 28 U.S.C. Section 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any low which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

STATEMENT OF THE CASE

The Petitioners brought this action pursuant to Maryland Rule 209(a) for the named Petitioners and on behalf of all those students similary situated, seeking a declaration that the councilmanic districts of the City of College Park are malapportioned in violation of the Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America.

The case was initiated with the filing of a Bill of Compliant for Declaratory Relief alleging that the councilmanic districts of the City of College Park were unconstitutionally apportioned in that, if students were counted in determining the population of Districts Three and Five for purposes of apportionment, said Districts would be unconstitutionally disproportionate to the other districts, and, therefore, the votes of

students in those districts would be diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. It was stipulated that students in Districts Three and Five were intentionally not counted by the City of College Park in determining the size of these Districts; and further, it was stipulated that students in these Districts could vote in College Park elections if otherwise qualified pursuant to the College Park Code. It was likewise agreed that the named Petitioners are registered to vote and, in fact, voted in City elections held in November, 1975.

The City defended this action initially on the basis that the named Petitioners did not have standing to bring this action, alleging that they were not bona fide residents of the City of College Park.

The matter went to hearing on February 4, 1976, before Judge Joseph A. Mattingly.

At the hearing, evidence was adduced by the Respondents indicating that the named Petitioners were not domiciliaries of the City of College Park, using the classic tests of situs of drivers' licenses, tax returns, and the like and, after Memoranda of Law were filed, the Court submitted a Memorandum Opinion dismissing the Petitioner's claim for lack of standing on the basis that they were not domiciliaries of the City of College Park.

The Petitioners appealed the dismissal to the Court of Special Appeals and the Court of Appeals, on its own Motion, filed a Writ of Certiorari to the Court of Special Appeals. After the filing of briefs and oral argument, the Court of Appeals reversed the findings of the lower court on the issue of the standing of the Petitioners without reaching any decision on the merits of the Petitioners' claim. After mandate, the case

was reargued before Judge Mattingly on October 6, 1977.

On the merits, the City, while conceding that, if the students in Districts Three and Five were counted, those voting Districts would be malapportioned, argued that the City had the right to exclude those students in the on-campus districts (i.e, Districts Three and Five) because they were either transients, short-term residents or nonresidents. The Petitioners argued that one could not reasonably distinguish between those students on-campus and those students off-campus. The City argued that there can be great fluctuations of the population of students on-campus causing a constant need to reevaluate the boundaries of the various councilmanic districts. Additionally, the City argued that the number of on-campus students who are, in fact, bona fide residents of Prince George's County is virtually negligible.

Petitioners argued that if you exclude the on-campus students but count the off-campus students, which it is agreed occurs, that you then cannot logically and constitutionally differentiate between the two classes. Petitioners further argued that the question of bona fide residency would have been decided when a student registered to vote, which any student has the right to do and that collateral attack on such qualifications was improper. On the issue of short-term residency, Petitioners argued that the authorities have held that certain people cannot be excluded from the population base for determining apportionment as a result of the nature of their employment.

The Court again requested Memoranda of Law and, after submission, the Court passed a Memorandum Opinion, dated November 1, 1977, which called for a reapportionment of the City of College Park, but indicated that the

City's only requirement was to reapportion Districts Three and Five on the basis of those students who, in fact, were registered to vote and not based upon the actual population of those Districts.

The City of College Park, pursuant to the Circuit Court's Memorandum Opinion and Order of November 15, 1977, submitted a plan in which the apportionment base was to be determined by including only registered voters from districts heavily populated by students but utilizing federal census data for the remainder of the population. The Court of Appeals held this plan unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment. The Court decided that using different standards to count students in different districts, the City established impermissible classifications without substantial justification.

As the result of this ruling, the

Defendant has submitted two alternative plans. Plan A establishes an apportionment base determined on the basis of a census, which would include only those residents of the City who can prove that they have an intention to remain in the City for an indefinite period of time. The City sought penalties for failure to respond to the questionnaire or for untruthful responses, of up to five hundred dollars or imprisonment. However, the Circuit Court found the questionnaire "both intrusive and obnoxious." The Court, however, approved Plan B. This alternative utilizes the list of registered voters as the apportionment base.

The Petitioners appealed and the Court of Appeals, issued a writ of certiorari. The Court of Appeals affirmed the judgement of the Circuit Court, thereby approving Plan B.

ARGUMENT

It is well settled that population is both "the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." Reynolds v. Sims, 377 U.S. 533, 567, 568 (1964). While numerous judicial opinions have utilized imprecise and undefined terms, such as citizens, citizen population, voters, qualified voters or registered voters, a brief consideration of the history of the "one man-one vote" principle leaves no doubt that total population must be the underpinning of any permissible apportionment plan.

The one man-one vote principle is grounded on the provision in the Constitution, Article I, Section 2, that representatives be chosen "by the People of the several States" and should be "apportioned among the several States . . . according to their respective numbers." This has

been construed to mean that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Wesberry v. Sanders, 376 U.S. 1, 8 (1964).

The aforementioned constitutional provision was the essence of "the Great Compromise" of the Constitutional Convention of 1787. The question of how the legislature should be elected formed the most severe controversy of the Convention. The Articles of Confederation had established a loosely bound conglomeration of States, without an independent executive or judicial branch and with a Congress consisting of a single house. Each State, without regard to population or size, had one vote in this legislature. Many of the delegates to the Convention argued for a legislature elected by the people. In support of this position, James Madison stated that "if the

power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all."1/ Delegate James Wilson said that "equal numbers of people ought to have an equal number of representatives . . ." and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."2/

Of course, the Compromise was that the legislature consist of two houses; one in which the States were to be represented, and another in which people were to be represented.

1/ The Records of the Federal Convention of 1787 (Farrand Edition 1911) at 472.

2/ Id., at 180.

As the Supreme Court has stated:

> The debates at the Convention make at least one fact abundantly clear; that when the delegates agreed that the House should represent "people" they intended that in allocating congressman the number assigned to each State should be determined solely by the number of the State's inhabitants. The Constitution embodied Edmond Randolph's proposal for a periodic census to ensure "fair representation of the people." an idea endorsed by Mason as assuring that "numbers of inhabitants" should always be the measure of representation in the House of Representatives." (footnotes omitted)

Wesberry v. Sanders, supra, at 13, 14.

The "one person-one vote" principle, therefore, clearly requires that any constitutionally permissible apportionment plan must reflect substantial equality in districts such that the weight of potential votes are not impaired, debased or diluted. Accordingly, where "population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of

the State's citizens to cast an effective and adequately weighed vote would be unconstitutionally impaired." Reynolds v. Sims, supra, at 581.

It is the contention of the City that the adoption of the plan furthers its interest in eliminating from the apportionment base non-residents and transients who have little or no interest in the affairs of the City. It further argues that neither plan intentionally or otherwise discriminates against any group.

In support of its position that registered voters constitute a permissible apportionment base, the City places heavy reliance on Burns v. Richardson, 384 U.S. 73 (1966) and Martin v. Venables, 401 F. Supp. 611 (D. Conn, 1975). In Burns the Supreme Court did, in fact, approve registered voter lists as a permissible apportionment base. However, the City ignores

the basis under which the plan was approved. First, the Court stated that the use of a registered voter basis presents problems in that such criteria depends on "the extent of political activity of those eligible to register and vote," Burns v. Richardson, supra, at 92. As such, it was found to be "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment." Further, the Court found problems in fluctuations in these lists caused by fortuitous factors. For these reasons, the Court propounded a limitation on the use of a registered voter base. Such base may be used only when it produces "a distribution of legislators not substantially different from that which would have resulted from the use of a

permissible population base." (Emphasis supplied.) Burns, supra, at 93.

The following statistics provided by the City of College Park clearly indicate that the use of a registered voter base would produce a distribution of legislators substantially different from that which would have resulted from the use of a permissible population base.

District	Registered Voters (1975)	Population Base Census (1970)	Students excluded	Total Population
1	697	2214		2214
2	454	1753		1753
3	449	2031	3812	5843
4	431	2442		2442
5	580	2271	4635	6906
6	284	1949		1949
7	482	2098		2098
8	390	2759		2759
TOTALS	3817	17,517	3447	25,964

Accordingly, the Petitioners respectfully submit that the use of a registered voter base does not produce substantially the same results as would a proper

population base and is, therefore, constitutionally impermissible.

Moreover, an equally important limitation has been recognized concerning apportionment plans in general and voter registration apportionment in particular. An apportionment plan is constitutionally impermissible where it is designed to or operates to minimize or cancel out the voting strength of racial or political elements of the voting population. Burns v. Richardson, supra.

Although the City of College Park asserts that the latest plans are neither designed nor intended to operate to dilute the voting power of on-campus students, this assertion must be considered in light of the City's previous ongoing efforts to do just that.

The motivation of the City is reflected in the record as early as June, 1967.

At a City Council meeting, a proposed Redistricting Resolution (67-R-3) was discussed. "Councilman Payne felt that college towns having a large resident student population in proportion to their total population would constitute an exception to the Attorney General's Opinion which permits the Bureau of the Census to enumerate resident students, living on campus, in their college towns. He further felt that including resident students in the total population would cause insufficient representation of year-round residents who pay taxes to the City and are concerned with its plan and problems. . . . Councilman Osborn spoke in favor of adoption of the Redistricting Plan, noting that University students are peripheral to the City's consideration regarding representation for the majority of residents . . . . The motion for adoption was then passed by

unanimous vote."

This debate on the issue clearly indicated the City's intent. It seeks to maximize the voting strength of non-students at the expense of and to the detriment of the students.

Further confirmation of the City's aims exists by virtue of the various plans submitted by the City. At first, the City attempted to simply ignore students as valid members of the apportionment base, using federal census data from which it subtracted the numbers of students living on campus. Next, the City attempted to utilize census data for all districts except those districts that had substantial student population. For those two districts only registered voters were to be counted in the apportionment base. Finally, the City, believing that a registered voter base might very well serve its

purposes, now seeks to establish the same criteria as nondiscriminatory and as blind to the nature and characteristics of the population.

The City's apparent rationale for its desire to minimize the voting power of students reflects their apparent concern that since students are assumed to have different interests in the affairs of the City, they would be inclined to vote contrary to the wishes of the majority non-student members of the community. The Supreme Court refers to this practice as "fencing out." The Court has stated that "fencing out" from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. "(T)he exercise of rights so vital to the maintenance of democratic institutions . . . cannot constitutionally be obliterated because of a fear of the political views of a particular

group of bona fide residents . . . ." (Citations omitted). Carrington v. Rush, 380 U.S. 89, 94 (1965).

Furthermore, the good faith of the City must be considered. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Supreme Court held that limited population variances are constitutionally permissible only if they are unavoidable despite a good faith effort to achieve absolute equality or if substantial justification is shown. In this case, the City's lack of good faith is clearly evident. When it fit their purposes, use of the federal census minus students was deemed appropriate. When that did not meet constitutional muster, a combination of the census and a registered voter requirement for students only was adopted. When that was found to be constitutionally inadequate, the latest means to the same end was adopted. Further, the

Court in Kirkpatrick, supra, found insufficient justification in such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the state, the high proportion of military personnel, college students, and other non-voters in some districts, or the political realities of legislative interplay. For those reasons, the Petitioner's respectfully suggest that the submitted reapportionment plan, adopted without good faith or satisfactory justification, are violative of the one man-one vote principle and, therefore, are unconstitutional.

Finally, it must be remembered that in deciding apportionment cases, the fundamental nature and importance of the vote in a democratic society cannot be overemphasized. It cannot be disputed that "the fundamental

principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state." Reynolds v. Sims, supra, at 560-61. It is clear that a citizen has a constitutionally protected right to be represented and to participate in elections on an equal basis with others in the jurisdiction. The impairment of the constitutionally protected right to be represented and the right to vote "touches a sensitive and important area of human rights" and "involves one of the basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 536 (1942). "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be

carefully and meticulously scrutinized." Reynolds v. Sims, supra, at 561-62.

In the instant case, an important question of federal law has been decided in a way in conflict with precedents established by the Supreme Court.

Accordingly, the Petitioners respectfully submit that the Plans offered by the City of College Park are unconstitutional attempts to dilute and debase the right to vote of a significant portion of the community. For these reasons, a writ of certiorari must issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari was mailed, by first class mail, postage prepaid, this 18th day of October, 1982, to Morris Topf, Attorney of Record for the Respondent, at Topf & Zell, 7735 Old Georgetown Road, Suite 530, Bethesda, Maryland 20014.

David K Nisbett

DAVID K. NISBETT